

# Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences



## RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

### 1. Name/Organisation

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### 3. Permissions - I am responding as...

Individual

Group/Organisation

*Please tick as appropriate*

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

*Please tick as appropriate*  Yes  No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

*Please tick ONE of the following boxes*

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

*Please tick as appropriate*  Yes  No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

*Please tick as appropriate*

Yes

No

## CONSULTATION QUESTIONS

**1. Does the existing criminal law provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse? Yes / No (if No, please specify how the existing law should be strengthened)**

Yes  No

We have longstanding concerns about justice for women who have experience domestic abuse.

These have come to the fore recently, for various reasons:

- the PF vs. Bill Walker domestic abuse case highlighted that many cases involving serious, long-term abuse are being prosecuted as summary, not solemn; and that many behaviours that are unacceptable and abusive are not criminal offences so cannot be fully recognised by the legal system;
- we have become aware of increasing strain on specialist Domestic Abuse courts, with waits far in excess of the target;
- cuts to legal aid have taken effect and more women are finding it difficult to access legal advice.

We aspire to a Scotland without domestic abuse, where it is not tolerated in any ways. We have had early sight of the first module on VAW in the Scottish Social Attitudes study (forthcoming, not yet able to be cited), which shows there is still some tolerance of DA in some demographics, and some minimising/excuses in certain circumstances.

We also know that children still see abuse in relationships as normal and natural in some circumstances: see e.g. Nancy Lombard's research with 11 and 12 year olds.

We welcome the progress that has been made in the 23 years since our first campaign but regret that some of the progress has been to rhetoric but not to practice; and has not been fully resourced.

So, we welcome a review of the criminal law in this area. We know that theoretically, the police/prosecutors can pursue domestic abuse offenders with their existing powers, but we believe that the law as it stands does not reflect survivors' experiences, and does not convey to domestic abuse perpetrators that the totality of what they are doing is wrong. Too many people still conceive of domestic abuse as physical assault; even though the theory and practice in most prevention and support organisations moved on years ago. The law needs to reflect current thinking about what domestic abuse really is - which is a pattern of coercive, controlling behaviour which goes far beyond a 'simple' common assault, or a series of incidents, and causes much more damage and trauma than a common assault/breach of the peace/threatening and abusive behaviour prosecution will ever reflect.

We have an increasingly sophisticated understanding of domestic abuse in Scotland and internationally, but Scottish criminal law has not moved beyond an incident based approach. This reform is the opportunity to do so.

This would help the Scottish Government to meet its obligations under CEDAW and the EU Victims Directive; and bolster its reputation for having some of the most innovative responses to domestic abuse in the world.

We have wider concerns about the justice response to the violence against women, which we will elaborate on in the final section of this consultation response.

**2. One of the ways in which it has been proposed the law could be strengthened is through the creation of a specific criminal offence concerning domestic abuse. Do you agree that this would improve the way the justice system responds to domestic abuse?**

Yes  No

Yes. A specific offence adds gravitas. It helps with social messaging about what domestic abuse really is; and that controlling, demeaning, humiliating behaviours are as problematic as physical violence. It helps survivors see that their experience is being written into the law; and gives them a better sense of justice and being believed and understood. It tells perpetrators that the behaviour they have been getting away with for years is not acceptable and will be criminalised.

Some forms of coercion are incredibly subtle and clever; they are designed to make the woman (most victims are women) feel that she is to blame or she is not of sound mind. So it will be very important for there to be a huge amount of awareness –raising and education to go alongside a new offence, to ensure that women know that the tactics some men use to control them are criminal.

One March 2014 study of coercion, in over 2,500 callers to a domestic abuse helpline ([http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/10/NCDVTMH\\_NDVH\\_MHSUCoercionSurveyReport\\_2014-2.pdf](http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/10/NCDVTMH_NDVH_MHSUCoercionSurveyReport_2014-2.pdf)) helped show some of the scale of the problem:

- In response to the question, ‘Has your partner or ex-partner ever called you “crazy” or accused you of being “crazy”?’ nearly 9 out of 10 women (85.7%) answered yes.
- Half of the callers (50.2%) had experience their partner or ex-partner threatening to report to authorities that they are “crazy” to keep them from getting something they want or need (e.g., custody of children, medication, protective order).
- Nearly three quarters of women (73.8%) thought their partner or ex-partner had deliberately done things to make them feel like they were “going crazy” or “losing their mind”.
- Nearly a third of women (27.0%) had been pressured or forced to use alcohol or other drugs, or use more than they wanted.

- Nearly 1 in 4 (37.5%) had experienced their partner or ex-partner threatening to report their alcohol or drug use to people in authority to keep them from getting something they want or need.
- Just under a quarter of women (24.4%) had been afraid to call the police for help because their partner or ex-partner said they wouldn't believe her because she were using, or she would be arrested for being under the influence of alcohol or other drugs.

A woman who has been made to feel that she is 'crazy' and who fears seeking help because of substance use, often coerced, is very vulnerable; and there will need to be considerable investment in advocacy and support services for women with these traumatic experiences to seek and secure justice.

A new domestic abuse offence will only enhance victims' access to justice if it is well used; and for it to work well and be used it must go alongside changes in how personnel inside the justice system understand DA. We recommend compulsory training for all first-responders (police, paramedics etc.), and for all sheriffs, fiscals, judges, social workers, adult and child protection personnel, and all personnel involved in prosecuting domestic abuse, in the dynamics and impact of domestic abuse; its gendered nature; and in coercive control and the shortfalls of an incident-based model.

There will also need to be detailed consideration of evidentiary matters, and a clear focus on how to identify, collect and present evidence of domestic abuse; and this may well necessitate further training. Such training will be a long-term investment in having a justice system that truly understands domestic abuse and is empowered to tackle it effectively. We hope that MARACs will play an important role in gathering evidence.

However, we agree with Professor Evan Stark who says that "for a coercive control law to be effective, it must be written and implemented in a way to avoid manipulation by offenders". Consultation with expert agencies which support women experiencing domestic abuse, such as Scottish Women's Aid and ASSIST, will be crucial in framing the offence to make it effective.

### **3. What behaviours which are not currently criminalised should be included within the scope of a specific offence?**

We would leave it to expert support organisations such as SWA and ASSIST to comment on this. As a prevention-focused organisation, we are more concerned with broad issues around how systems of justice operate. However, we would hope that an offence of Domestic Abuse would include behaviours which are clearly designed to intimidate, restrict a person's liberty and space for action, and subjugate the partner or ex-partner being subjected to the behaviour; that could clearly be understood to be domestic abuse as it has been understood in Scotland for many years now; and not behaviours which are part of a normal relationship with some ups and downs.

We have a concern that abusive and controlling men may seek to use this

new offence as a new tool to harass their partners and ex-partners; for example they could name their (appropriately) limited access to their children as a form of controlling behaviour by their ex-partner and could try to label this as domestic abuse. That is why writing the law carefully will be so important, as stated above.

Domestic abuse is a gendered offence; it happens in the context of a society in which women have significantly less power and privilege than men; and is rooted in these wider gender inequalities and in long-standing gender roles (which are generally still applicable in same-sex relationships featuring domestic abuse). So it must be that the new offence reflects that. Our gendered analysis has enabled the development of pioneering prevention and protection work in Scotland and has led to women's lives being better; we must safeguard that approach in designing this new offence. This would align with the gender-based definition of domestic abuse in the Equally Safe strategy.

**4. Should any specific offence of 'domestic abuse' be restricted to people who are partners or ex-partners, or should it cover other familial relationships?**

Yes, it should be restricted. Domestic abuse has been understood as something that happens between partners and ex-partners for many years. It is not the same as other forms of (unacceptable) abuse, such as family violence, elder abuse, or sibling abuse.

It is very important that we don't dilute out understanding of domestic abuse. It is a specific, gendered phenomenon, rooted in power imbalances in relationships, which are rooted in the gender roles brought to those relationships, which mirror the deeply unequal society we live in, in which women are a subordinate group. Widening out this definition to abuse by other family members risks losing that understanding, which has driven so much service development and prevention/campaigns work in Scotland.

**5. Are there any other comments you wish to make about the creation of a specific offence of domestic abuse?**

While it is very welcome, we need much more focus on prevention of domestic abuse. This consultation is about how to address violence or abuse after the fact. What equivalent measures does the Scottish Government intend to introduce to prevent it from happening in the first place? There are many specific VAW prevention measures and measures to tackle the gender inequalities that underpin it, that we would welcome. We are concerned that successive governments have adopted rhetoric around prevention but have not invested in it.

The Equally Safe strategy is supposed to be overseen by a strategic board and a range of sub-groups including a prevention sub-group, and yet a year

after the strategy was published, no board or groups have been established. This is extremely disappointing. We would caution against making legislative change the only focus of government activity.

**6. Do you think that there should be a statutory aggravation that a criminal offence was committed against a background of domestic abuse being perpetrated by the accused? Yes/No if no, please give reasons for your answer**

Yes  No

Yes. The aggravator model is well known and understood. It makes instinctive common sense. It fits with the wider power dynamics of DA to say a 'simple' offence e.g. a common assault is made worse by the fact of it occurring within the context of DA. As with the specific offence, this aspect will necessitate training and CPD for professionals; and population-level awareness-raising and education measures.

**7. If you think that there should be a statutory aggravation of this kind, do you think this should be in addition to, or instead of, a specific statutory offence of 'domestic abuse'? Give reasons**

In addition to. The combination of a specific offence and an aggravator should bolster victims' chances of securing justice.

**8. Do you agree that it should be a specific criminal offence to share private, intimate images of another person without their consent? If no, give reasons**

Yes  No

This behaviour is an issue we have become increasingly concerned about. Our 'Under Pressure' training on preventing teen exploitation identified that non-consensual image-sharing was affecting high numbers of Scottish teenagers.

In our baseline study of Youth Workers across Scotland (2012), well over half (58.5%) said they had experience of young people exchanging images or texts with content which involved harmful gender stereotyping or could be seen as sexually demeaning or abusive.

One commentator said, "How do you teach a 14-year-old, who's used his mobile phone to film a girl performing a sexual act, about the complex nature of 'consent'? What if his frames of reference come from pornography on mobile phones at school? What can be done to help young people have healthy relationships?"

Since then, SWA has conducted research on this issue and found that the impacts of having intimate images shared without consent were significant, with most people reporting some form of long-term anxiety and other mental health impacts including suicidal ideation; and impacts on their children. 83% of the survey respondents were women. This fits with our understanding of this as a very gendered behaviour, which is in essence about men policing women's behaviour according to beliefs about gender roles.

The creation of this offence may also trigger a welcome debate about the nature of intimate images that are shared in other spaces, such as by the very salacious red-top newspapers we have in the UK, and in the pornography industry, which feeds this problem.

The intent behind sharing intimate images without consent is usually to humiliate, distress, seek 'revenge' for some alleged slight, and evidence from women who have experience this indicates that it forms part of an ongoing pattern of abuse. Creating a specific criminal offence to tackle this will complement the creation of a domestic abuse offence centred around coercion and 'intimate terrorism'. (This phrase by Michael Johnson is useful for capturing what many women live through).

**9. Do you agree with the proposal that the offence should be restricted to images?**

Yes  No

The offence should capture any media which an abuser can use to humiliate and control a woman, including images but also sound files, emails, texts, video clips, and photo-shopped or composite images.

Men who seek to control and humiliate women are often capable of being extremely creative and clever in their abusive behaviour; and if an offence is too narrowly constructed they will find other means of achieving the same ends, so it is important for the offence not to be limited to images.

**10. Should the types of images that should be covered by the offence should be based on the definition of a 'private act' contained at section 10 of the Sexual Offences (Scotland) Act 2009? Or do you think a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understand it to be such would be more appropriate?**

We prefer the latter definition. This has more scope for careful interpretation and could include images which are not necessarily sexual but still intimate, for example someone in a vulnerable position (toileting, using drugs, pictured without religious garb, unconscious).

**11. Do you agree that the offence should be framed so that a person commits an offence where they share a private image of another person and they knew or ought to have known that its sharing/distribution would be likely to cause that person alarm or distress**

Yes  No

We agree, and also support SWA's position that this should be strengthened by adding that a person commits an offence if they were reckless as to the consequences on the person of the sharing/distribution.

**12. Do you agree that it should be an offence to threaten to share private, intimate images of another person without their consent?**

Yes  No

We strongly agree with this.

**13. What level of maximum penalty do you think should apply for the new offence? Do you have any other comments regarding the penalties for the new offence?**

No comment - only that the penalty should be reflective of the harm and trauma caused. We would leave this to penal experts to determine.

**14. Do you think that there should be statutory defences to the proposed offence of disclosing a private, intimate image?**

Yes  No

Comments



**15 If so, what defences do you think should be provided and why do you think they are needed?**

No comment.

**16. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false?**

Yes  No

We strongly support this provision. Despite sterling efforts by the COPFS to bring more rape cases to trial, juries remain reluctant to convict, and the use of the Not Proven verdict remains higher than we would expect (20%).

Any measures which go some way to challenging jurors' assumptions about the 'normal' way to react to sexual assaults is welcome and important. There is still a misperception that most women would resist physically and report immediately, and this affects women's access to justice for rape, one of the most heinous crimes.

This perhaps reflects the victim-blaming attitudes that still persist in Scottish society – e.g. a SG 2010 study found that 23% of people think a woman can be at least partly responsible for rape if she is drunk at the time of the attack, and 17% thought a woman bore some responsibility if she wore revealing clothing. Too many rape trials conclude that the alleged rape was in fact 'rough sex' and too many women are re-traumatised by their experience of seeking justice.

It will be important for judicial training on this matter to persuade judges of its importance, so that they make these remarks in a way that conveys their verity. It will be important that judges are not able to say some variation of "I have to tell you this..." in a tone that suggests they do not themselves believe it to matter.

**17. Do you consider that the terms of the jury direction used in New South Wales, Australia, requiring the judge to warn the jury that the absence of complaint or delay in complaining does not necessarily mean an allegation is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for a similar direction in Scots law?**

Yes  No

We defer to the expertise of Rape Crisis Scotland on this matter.

**18. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not physically resist their attacker and that this does not indicate that it is false?**

Yes  No

Our view on this is as per our comments on question 16. We support it.

We know that many people, who may end up on juries, believe that the response to an assault is either 'fight or flight', and that people don't understand that sometimes, the person being assaulted freezes. It would be good to introduce factual information in the court process, to help jurors to better understand the situation they are seeking to assess.

**19. Do you have any comments on how such a statutory jury direction should be worded?**

We defer to the expertise of RCS on this matter. We believe that it should be worded in plain English and be easily understood by anyone.

**20. Do you agree that non-harassment orders should be available to the court where the court is satisfied, following an examination of facts, that a person did carry out the acts constituting the offence with which they were charged?**

Yes  No

We have no comment to make on this provision.

**21. If you do not support extending the circumstances in which the courts can make a non-harassment order in this way, do you have any views on other approaches that would protect victims from harassment or stalking by persons found unfit for trial?**

We have no comment to make on this provision.

**22. Do you agree that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to prosecute offences committed in other jurisdictions within the United Kingdom?**

Yes  No

Yes, this loophole needs to be closed.

**23. Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)?**

Yes  No

Reforms to the criminal law around violence against women have a beneficial effect on women's equality.

**24. Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?**

No.

**25. Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government (police, Scottish court service, prison service, COPFS), local government or for other bodies, individuals and businesses?**

We would wish all reforms to be adequately resourced, so that policy meets practice. We note that until very recently, the wait for a specialist domestic abuse court in Glasgow was very significant (36 weeks); and that this was because the courts were straining to cope with the number of cases in the resources available.

Resources will need to be made available for training, education, awareness-raising, implementation, monitoring and evaluation.

**26. Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?**

Yes – VAW is a human rights matter, so effective measures to tackle VAW enhance women's enjoyment of their human rights.

**27. Do you have any other comments about the content of this paper?**

We welcome this review of the criminal law but would like to see reform in other branches of justice, including civil law.

We are aware of very concerning practice in family courts, and child contact with abusive fathers remains a serious issue in Scotland. Too many judges still do not make the connection between domestic abuse and child trauma. Only last week we were made aware of a case, where a woman who has experienced serious physical abuse for many years and is seeking to keep residency of her children, was told not to bring 'every scuffle' to the family court, as they were trivial matters. Victims of domestic abuse frequently talk

about perpetrators using child contact as a way of getting to them. A review of this aspect of our justice system is overdue.

There have been practitioners trained to conduct Safe Contact assessments; unfortunately, we are aware from our conversations with people engaged in this process that there has been a reluctance to implement i.e. ask for the reports. We would recommend the use of a recognised framework to assess child safety in contact.

We are not convinced that there is currently a shared understanding of domestic abuse across the justice system. We would support a review of training for all involved in the justice system including bar reporters, safeguarders, curators, contact centre staff, and solicitors, to check what training and CPD is currently available as optional/compulsory and to inform the development of a new training programme. It is vital that the people who are closest to prosecuting DA understand fully what it is.

As this consultation aims to address the Criminal Justice response to Violence against Women, connected to the 'Equally Safe' Strategy, we believe that the Scottish Government should also introduce legislative change around commercial sexual exploitation, especially prostitution.

The current law around prostitution treats it as a public nuisance issue and sometimes penalises the exploited. We believe that prostitution is a Violence against Women issue and a serious threat to women's equality. We would like to see concerted action to tackle the harm it causes, by tackling the issue of men's demand for access to women's bodies for exploitative and harmful sex. We suggest the SG criminalises the buying of sex in any setting; decriminalises people involved in prostitution; and, crucially, provides long-term support and exiting services for those exploited through prostitution.

We would like to see more measures to ensure rape complainants have access to justice – including the use of independent legal representation, an end to the use of sexual history and character evidence, restrictions on the use of medical records, and removal of the Not Proven verdict.

It seems to us that much of the change that is needed, if domestic abuse and rape are to be effectively prosecuted, relied on the removal of the corroboration requirement in Scots law, and now that this is no longer under active consideration, we have real concerns about how women will get justice for crimes committed, by and large, in private. We urge the Scottish Government to look again at how the corroboration requirement impacts on women who have experience violence and abuse.

Our over-arching concern is that prevention of abuse and violence is still not as high a priority as it should be. We all need to be 'Equally Safe' from this abuse ever happening, not just safe after it happens.

We want to see mainstreaming of gender equality across all SG departments; to avoid creating a very specialised, informed, discrete justice system that sits apart from other policy-making and from wider public

attitudes.

We trust that the forthcoming Scottish Social Attitudes module on VAW will catalyse work to challenge public tolerance of any and all forms of VAW and of the gender inequality that underpins it. The law can only send a signal and drive change if people are signed up to the underlying issues, so there needs to be a raft of awareness-raising and education work to go alongside the legal change this paper would deliver.

We trust too, that the implementation of the Equally Safe strategy and that further consultation on measures emerging from this exercise will be driven by a strategic board and expert groups, which will be appointed forthwith. We can't afford to wait any longer. All women deserve to be Equally Safe, now.